



DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203, 204, 206, 212, 215, and 235

[Docket DARS-2023-0002]

RIN 0750-AL57

**Defense Federal Acquisition Regulation Supplement: Defense
Commercial Solutions Opening (DFARS Case 2022-D006)**

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2022 that authorizes DoD to acquire innovative commercial products and commercial services using general solicitation competitive procedures. This final rule also implements a section of the National Defense Authorization Act for Fiscal Year 2023.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Ms. Jeanette Snyder, 703-508-7524.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the **Federal Register** at 88 FR 6605 on January 31, 2023, to implement section 803 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117-81). Section 803 modifies 10 U.S.C. 2380c (redesignated as 10 U.S.C. 3458) to give DoD the authority to acquire innovative commercial products and commercial services through a competitive selection of proposals resulting from a general solicitation and the peer review of such proposals. Section 803 of the NDAA for FY 2022 also repealed section 879 of the NDAA for FY 2017, which authorized a pilot program providing the same authority for a limited period of time. In addition, section 814 of the NDAA for FY 2023 (Pub. L. 117-263) amended 10 U.S.C. 3458 by striking "fixed-price incentive fee contracts" and inserting "fixed-price incentive contracts". Therefore, this final rule incorporates this statutory amendment. One respondent submitted a public comment in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comment in the development of the final rule; however, no changes were made to the rule as a result of the comment received. A discussion of the comment and a summary of significant changes is provided, as follows:

A. Summary of Significant Changes from the Proposed Rule

Section 814 of the NDAA for FY 2023 (Pub. L. 117-263) amended section 3458 of title 10, United States Code, by striking "fixed-price incentive fee contracts" and inserting "fixed-price

incentive contracts". Therefore, this final rule amends DFARS 212.7002(b) to clarify the contract types that may be used in conjunction with a commercial solutions opening.

B. Analysis of Public Comments

Comment: One respondent submitted a comment regarding banking practices involving Oregon.

Response: This comment is outside the scope of this rule.

C. Other Changes

This final rule removes the reference to section 803 of the NDAA for FY 2022 (Pub. L. 117-81) at DFARS 212.7000, since the authority for commercial solutions openings is now codified at 10 U.S.C. 3458. The new DFARS section 203.104-1 is reformatted to reflect standard drafting conventions. The new paragraph at 206.102 is moved to new section 206.102-70 to reflect standard drafting conventions. In section 212.102 paragraph (a)(i)(B), the obsolete term "commercial item determination" is replaced with "commercial product or commercial service determination." This change was included in the final rule for DFARS Case 2018-D066, published at 88 FR 6578 on January 31, 2023; however, the change was not made in the Code of Federal Regulations.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold, for Commercial Products Including Commercially Available Off-the-Shelf Items, and for Commercial Services

This rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation

provisions or contract clauses, or their applicability to contracts valued at or below the simplified acquisition threshold, for commercial products including commercially available off-the-shelf items, or for commercial services.

IV. Expected Impact of the Rule

This final rule implements the permanent statutory authorization for DoD to acquire innovative commercial products and commercial services through a competitive selection of proposals resulting from a general solicitation known as a commercial solutions opening and the peer review of such proposals in conjunction with a FAR part 12 contract. This rule is expected to impact the Government and large and small entities by simplifying solicitation, evaluation, and award procedures, which should decrease acquisition cost and, thus, be less burdensome for all parties. The use of a commercial solutions opening in conjunction with a FAR part 12 contract is also expected to benefit offerors and contractors as it will allow these entities to utilize existing commercial contracting procedures and operating systems, which decreases burden on both large and small entities. As a result, large and small entities may be more willing to enter into contracts with DoD. Therefore, DoD expects to benefit by having greater access to technologies not previously accessible.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory

alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VII. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* and is summarized as follows:

This final rule is necessary to implement section 803 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 (Pub. L. 117-81) and section 814 of the NDAA for FY 2023 (Pub. L. 117-263). Section 803 modifies 10 U.S.C. 2380c (redesignated as 10 U.S.C. 3458) to permanently authorize DoD to acquire innovative commercial products and commercial services through a competitive selection of proposals resulting from a general solicitation, known as a commercial solutions opening (CSO), and the peer review of such proposals in conjunction with a FAR part 12 contract. Section 814 amends 10 U.S.C. 3458 to replace "fixed-price incentive fee contracts" with "fixed-price incentive contracts". The objective of this rule is to implement the authority for DoD to obtain innovative solutions or potential capabilities to fulfill requirements, close capability gaps, or provide potential technological advancements that are new as of the date of submission of a proposal or that is a new application as of the date of submission of a proposal of a technology, process, or method existing as of such date. The use of a CSO with a FAR part 12 commercial contract is intended to bring new entrants into the DoD marketplace.

No public comments were received in response to the initial regulatory flexibility analysis.

Section 879 of the NDAA for FY 2017 (Pub. L. 114-328) previously authorized a pilot program for the Defense CSO (the pilot), which was repealed by section 803 of the NDAA for FY 2022. According to data from the Federal Procurement Data

System, during the pilot (FY 2018 to FY 2022), DoD awarded a total of 120 contracts as a result of CSOs, of which 82, or 68 percent, were awarded to a total of 72 unique small entities. During FYs 2020, 2021, and 2022, 19 unique small entities were awarded a contract resulting from a CSO each year. In addition, one unique small entity received such an award in FY 2018, and 14 unique small entities received such awards in FY 2019. This averages out to approximately 14 unique small entities receiving contracts resulting from a CSO during the last five FYs. Data from the System for Award Management revealed there were 330,704 small entities registered as of June 2023. However, since the use of a CSO with a FAR part 12 contract is intended to attract new entrants into the market, these numbers may not fully capture the number of small entities to which this rule may apply. Therefore, DoD cannot provide a more precise estimate of the number of small entities to which this rule may apply.

This final rule does not impose any new reporting, recordkeeping, or other compliance requirements for small entities.

DoD did not identify any significant alternatives that would minimize or reduce the significant economic impact on small entities, because there is no significant impact on small entities.

VIII. Paperwork Reduction Act

This proposed rule does not contain any new information collection requirements that require the approval of the Office

of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 203, 204, 206, 212, 215, and 235.

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 203, 204, 206, 212, 215, and 235 are amended as follows:

1. The authority citation for parts 203, 204, 206, 212, 215, and 235 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

2. Add section 203.104-1 to subpart 203.1 to read as follows:

203.104-1 Definitions.

As used in this section—

Federal agency procurement, defined at FAR 3.104-1, also includes commercial solutions openings.

PART 204—ADMINISTRATIVE AND INFORMATION MATTERS

3. Amend section 204.1603 by revising paragraph (a)(3)(A)(2) and adding a sentence at the end of paragraph (a)(4) to read as follows:

204.1603 Procedures.

(a) * * *

(3) * * *

(A) * * *

(2) Use S to identify broad agency announcements and commercial solutions openings.

* * * * *

(4) * * * Use C in position 10 to identify the solicitation as a commercial solutions opening.

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PART 206—COMPETITION REQUIREMENTS

4. Add section 206.102-70 to read as follows:

206.102-70 Other competitive procedures.

Competitive selection of proposals based on a review by scientific, technological, or other subject-matter expert peers resulting from a commercial solutions opening as described in subpart 212.70 (10 U.S.C. 3458) is a competitive procedure.

PART 212—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

5. Amend section 212.102—

a. In paragraph (a)(i)(B) introductory text by removing “commercial item determination” and adding “commercial product or commercial service determination” in its place; and

b. By adding paragraph (a)(i)(B)(3).

The addition reads as follows:

212.102 Applicability.

(a) * * *

(i) * * *

(B) * * *

(3) 10 U.S.C. 3458 - Supplies or services resulting from a commercial solutions opening pursuant to subpart 212.70.

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6. Amend section 212.203 by adding paragraph (4) to read as follows:

212.203 Procedures for solicitation, evaluation, and award.

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(4) See subpart 212.70 for acquisitions resulting from a commercial solutions opening.

7. Add subpart 212.70, consisting of sections 212.7000 through 212.7005, to read as follows:

Subpart 212.70—Defense Commercial Solutions Opening

Sec.

212.7000 Scope of subpart.

212.7001 Definition.

212.7002 Policy.

212.7003 Limitations.

212.7004 Procedures.

212.7005 Congressional notification.

Subpart 212.70—Defense Commercial Solutions Opening

212.7000 Scope of subpart.

This subpart implements 10 U.S.C. 3458 for the acquisition of innovative commercial products or commercial services through the use of a general solicitation known as a commercial solutions opening (CSO).

212.7001 Definition.

As used in this subpart—

Innovative means—

(1) Any technology, process, or method, including research and development, that is new as of the date of submission of a proposal; or

(2) Any application that is new as of the date of submission of a proposal of a technology, process, or method existing as of such date.

212.7002 Policy.

(a) Contracting officers may only use a CSO—

(1) To obtain innovative solutions or potential capabilities that fulfill requirements;

(2) To close capability gaps, or provide potential innovative technological advancements; and

(3) When meaningful proposals with varying technical or scientific approaches can be reasonably anticipated.

(b) Notwithstanding FAR 12.207, contracting officers shall use fixed-price type contracts, including fixed-price incentive contracts, for awards resulting from a CSO. When using a fixed-price incentive contract, see FAR 12.214 and subpart 16.4 for additional requirements.

(c) Contracting officers shall treat products and services acquired using a CSO as commercial products or commercial services.

(d) When using a CSO to acquire research and development, contracting officers shall use the procedures of this subpart in

conjunction with FAR part 35 and part 235. A CSO is not subject to the limitations at 235.016 and may be used to fulfill requirements for research and development, ranging from advanced component development through operational systems development.

212.7003 Limitations.

Contracting officers shall follow the procedures at PGI 212.7003 to obtain senior procurement executive approval to award a contract in excess of \$100 million resulting from a CSO.

212.7004 Procedures.

This section prescribes procedures for the use of a CSO.

(a) The CSO shall—

(1) Describe the agency's interest for an individual program requirement or for broadly defined areas of interest covering the full range of the agency's requirements;

(2) Specify the technical data required that may be necessary to meet DoD's minimum requirements (see 227.7102 and 227.7202);

(3) Describe the evaluation factors for selecting proposals to include—

(i) Technical and importance to agency programs as the primary evaluation factors;

(ii) Price to the extent appropriate, but at a minimum to determine that the price is fair and reasonable; and

(iii) Relative importance of the factors, and the method of evaluation;

(4) Specify the period of time during which proposals submitted in response to the CSO will be accepted; and

(5) Contain instructions for the preparation and submission of proposals.

(b) The contracting officer shall publicize the CSO through the Governmentwide point of entry and, if authorized pursuant to FAR subpart 5.5, may also publish a notice regarding the CSO in noted scientific, technical, or engineering periodicals. The contracting officer shall publish the notice at least annually.

(c) Proposals received in response to the CSO shall be evaluated in accordance with evaluation factors specified therein through a scientific, technological, or other subject-matter expert peer review process. Written evaluation reports on individual proposals are required, but proposals need not be evaluated against each other since they are not submitted in response to a common performance work statement or statement of work.

(d) Synopsis of proposed contract actions under FAR subpart 5.2 of individual contract actions based upon proposals received in response to the CSO is not required. The notice published pursuant to paragraph (b) of this section fulfills the synopsis requirement.

(e) When a small business concern would otherwise be selected for award but is considered not responsible, follow the Small Business Administration Certificate of Competency procedure (see FAR subpart 19.6).

(f) The contracting officer shall document the decision that the requirements of this subpart have been met and include the documentation in the contract file.

212.7005 Congressional notification.

See PGI 212.7005 for congressional notification requirements for contracts valued at more than \$100 million that are awarded pursuant to a CSO.

PART 215—CONTRACTING BY NEGOTIATION

8. Amend section 215.371-4—

a. In paragraph (a)(4) by removing “or”;

b. In paragraph (a)(5) by removing the period and adding “; or” in its place; and

c. Adding paragraph (a)(6).

The addition reads as follows:

215.371-4 Exceptions.

(a) * * *

(6) Acquisitions under a commercial solutions opening pursuant to subpart 212.70.

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9. Add subpart 215.6, consisting of sections 215.602 and 215.604, to read as follows:

Subpart 215.6—Unsolicited Proposals

215.602 Policy.

The policy at FAR 15.602 applies to commercial solutions openings.

215.604 Agency points of contact.

(a)(3) The guidance at FAR 15.604(a)(3) applies to commercial solutions openings.

PART 235—RESEARCH AND DEVELOPMENT CONTRACTING

10. Amend section 235.006-71 by revising paragraph (a) to read as follows:

235.006-71 Competition.

(a)(1) Use of a broad agency announcement with peer or scientific review for the award of science and technology proposals in accordance with 235.016(a) fulfills the requirement for full and open competition (see 206.102(d)(2)).

(2) Use of a commercial solutions opening with scientific, technological, or other subject-matter expert peer review for the award of innovative solutions or potential capabilities in accordance with subpart 212.70 fulfills the requirement for full and open competition (see 206.102-70).

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